STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA BUCKLEY,

Plaintiff-Appellee/Cross-Appellant,

v

CHAKRAPANI RANGANATHAN, M.D., and NEUROLOGICAL REHABILITATION ASSOCIATES, P.C.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 1, 2003

No. 230262
Macomb Circuit Court
LC No. 98-003-167-NH

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

In this medical malpractice action, defendants appeal from a judgment entered on a jury verdict for plaintiff. Plaintiff cross-appeals. We reverse.

This case arises from a back injury plaintiff sustained as a result of a fall. Plaintiff claimed that defendant Dr. Chakrapani Ranganathan,[1] who had been treating plaintiff for seizures, improperly doubled her dosage of Tegretol which caused elevated blood levels of the drug to the point of toxicity. She alleged that the increase in the dosage and resultant Tegretol toxicity caused her fall. Plaintiff alleged that defendant breached the standard of care by failing to prescribe the appropriate dosage of Tegretol, failing to administer a blood count before or after prescribing and/or increasing plaintiff's medication to check her levels of Tegretol, failing to warn plaintiff of the early signs of toxicity and the adverse effects of Tegretol, failing to monitor plaintiff's blood level of Tegretol, failing to reduce the dosage to a safe and appropriate minimum effective level in a timely manner, and failing to recognize and treat the early signs of acute toxicity.

At trial, defendant denied any negligence and asserted that because plaintiff was faring well on the two hundred milligram dose of Tegretol, albeit twice the prescribed dose, he instructed her to continue with that dose because to halve it at that point would be dangerous. Defendants' expert neurologist testified that defendant's maintenance of plaintiff on two hundred

[1] The use of the singular "defendant" will refer only to defendant Dr. Ranganathan.

milligrams of Tegretol comported with the standard of care. Defendants argued that plaintiff's Tegretol toxicity was caused by the interaction of Tegretol and Darvocet, which another doctor had prescribed for plaintiff's pain. Both expert witnesses testified that Darvocet can raise the level of Tegretol in the blood when both drugs are taken together.

The jury returned a verdict for plaintiff in the amount of $395,800. Defendants appeal evidentiary issues and the trial court's denial of their motion for directed verdict on future damages. Plaintiff cross-appeals the trial court's denial of her motion for summary disposition or default.

I. Expert Witness Testimony

Qualification of Plaintiff's Expert Witness

Defendants argue that the trial court erred in allowing the testimony of plaintiff's expert witness, Dr. Roger Lemmen, because he did not satisfy the criteria of MCL 600.2169(1)(a). We disagree.

"Whether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony are within the trial court's discretion." *Tate ex rel Estate of Hall v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002), citing *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). "Such decisions are reviewed on appeal for an abuse of discretion." *Id.* This Court reviews de novo questions of law such as the interpretation and application of statutes. *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000); *Mager v Dep't of State Police*, 460 Mich 134, 143 n 14; 595 NW2d 142 (1999); *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999).

First, defendants challenge Dr. Lemmen's qualification on the ground that he is not board certified in the same area of specialty as defendant. Both defendant and Dr. Lemmen are board certified in neurology, and defendant is also board certified in clinical neurophysiology.

MCL 600.2169 governs the qualifications of expert witnesses who testify to the applicable standard of care in medical malpractice actions. "[I]f the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." MCL 600.2169(1)(a). This Court held in *Tate*, *supra*, that "the specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold." *Tate*, *supra* at 218. See *McDougall v Schanz*, 461 Mich 15, 25 n 9; 597 NW2d 148 (1999); *Nippa v Botsford General Hosp*, 251 Mich App 664, 673; 651 NW2d 103 (2002).

We conclude that Dr. Lemmen was properly qualified as an expert witness under § 2169. The matching board certification requirement is satisfied because both defendant and Dr. Lemmen are board certified neurologists. The statute does not require matching subspecialties. MCL 600.2169(1)(a).

Defendants also challenge Dr. Lemmen's qualification under § 2169(b), which requires that in the year preceding the event that forms the basis for the action, the expert witness "devoted a majority of his or her professional time to . . . the active clinical practice" of the

specialty practiced by the party against whom he testifies. MCL 600.2160(1)(b)(i).[2] Defendants contend that Dr. Lemmen did not devote a majority of his time to the clinical practice of neurology because he testified that half of his practice involved medical evaluations for legal purposes. We disagree. Dr. Lemmen testified that these evaluations were clinical exams and that his practice was "primarily clinical where [he] evaluated patients." He also sees patients on an out-patient basis. We find no abuse of discretion in the trial court's determination that Dr. Lemmen was qualified to testify as an expert under § 2169(1)(b)(i).

Scope of Dr. Lemmen's Testimony

Defendants argue that Dr. Lemmen should not have been permitted to testify to breaches of the standard of care which he acknowledged did not cause plaintiff's injury. Defendants argued that the evidence was not relevant, and in the alternative, that even if the evidence was relevant, it should have been excluded under MRE 403 because its prejudicial effect substantially outweighed any probative value.

In their brief on appeal, defendants cite to portions of Dr. Lemmen's testimony in which he states (1) he found no medical reason to change plaintiff's Tegretol dosage between February and May 1996, (2) if defendant had intended to double her dosage in February 1996, he did not properly document the change, and (3) that defendant should have checked her blood levels at least by the end of May 1996 when plaintiff's dosage was documented and there was some question about the dosage plaintiff was taking and the dosage she should have been taking. On cross-examination Dr. Lemmen acknowledged that defendant's failures to properly document plaintiff's dosage before May 1996, which he considered to be violative of the standard of care, did not directly cause plaintiff's injury.

We conclude that Dr. Lemmen's testimony was relevant to explain how the confusion about plaintiff's Tegretol dosage originated. Dr. Lemmen did not testify to "collateral bad acts" that were "unrelated to the duty at issue" as defendants contend. The issue, as Dr. Lemmen stated it, was the confusion regarding the proper dosage of Tegretol, what defendant intended, and when he first became aware, or should have become aware, of a discrepancy between the prescribed dosage of Tegretol as reflected in plaintiff's chart and the amount plaintiff was actually taking. Defendant's conduct was relevant inasmuch as it may have contributed to the confusion about plaintiff's Tegretol dosage at different times. We conclude that Dr. Lemmen's testimony was relevant and not unfairly prejudicial, and that the trial court did not abuse its discretion in allowing the testimony.

Admissibility of Defendants' Expert Witness Testimony

Defendants argue that the trial court erred in excluding the testimony of their expert witness, Dr. Richard Berchou. We agree.

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[2] Alternatively, subsection 2169(1)(b) may be satisfied by showing that during the year preceding the date of the occurrence that is the basis for the action, the expert witness devoted a majority of his professional time to the instruction of students in the relevant specialty. MCL 600.2169(1)(b)(ii). In this case, it was not disputed that Dr. Lemmen did not teach.

Dr. Berchou is a psychopharmacologist at Wayne State University. Defendants offered his testimony about the effect Darvocet has on Tegretol levels in the blood when both drugs are taken together. Dr. Berchou explained that both drugs are metabolized by the same enzyme in the liver, and taking Tegretol and Darvocet together can result in a toxic level of Tegretol because Darvocet inhibits the metabolism of Tegretol. Plaintiff did not question Dr. Berchou's qualifications, but challenged the basis for his opinion under MCL 600.2955. After Dr. Berchou was questioned at length by both parties, the trial court excused[3] the witness because the court determined that Dr. Berchou's opinion did not satisfy the statute:[4]

> *THE COURT:* There's no question in my mind that the gentleman is an expert in this field here. But the way I read the statute in an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the Court determines that the opinion is reliable and will assist the trier of fact. In making a determination, the Court shall examine the opinion and the basis for the opinion which bases include the facts, technique, methodology and reasoning relied on by the expert and [ ] shall consider all the following factors. And it lists a number of factors in here. And the Court feels that even though the witness is an expert in his own field, it's not pursuant to the statute MCL 600.2955. And accordingly, the Court is going to grant the motion of the plaintiff in this matter and he will be excused.[5] [footnote added].

MCL 600.2955 governs the admissibility of scientific or expert opinion evidence. Pursuant to MCL 600.2955(1), "[i]n an action for . . . injury to a person or property," the trial court must determine "that the [scientific] opinion is reliable and will assist the trier of fact." The statute provides in relevant part:

> Sec. 2955. (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique,

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[3] We note that the voir dire as well as some direct examination and the trial court's ruling occurred in the presence of the jury. After the court excused the witness, the court did not strike the testimony or instruct the jury to disregard it.

[4] In its opinion denying defendants' postrial motion, the court did not state that the substance of the proposed testimony did not comply with the statute, that it was not reliable, or that it would not assist the trier of fact. Rather, the court concluded that Dr. Berchou's testimony was properly excluded because it would have been cumulative.

[5] Plaintiff claims on appeal that Dr. Berchou's testimony would not assist the trier of fact because the studies on which he relied for his opinion involved different drugs, and did not involve Darvocet. Plaintiff did not make this argument for exclusion at trial. Moreover, although Dr. Berchou conceded that the study at issue involved Tegretol and Darvon, not Darvocet, he clarified that Darvocet is a combination product that also contains Tylenol, but that the active component, Propoxyphene, in both was the same.

methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

We conclude that the trial court erred in excluding Dr. Berchou's testimony. Dr. Berchou testified that his opinion was based on numerous studies and articles on the subject of this drug interaction. During voir dire by plaintiff's counsel, Dr. Berchou testified that the studies confirm what dosage of Tegretol and what dosage of Darvocet form the basis for the studies' conclusions that Darvocet can affect Tegretol levels. When defense counsel continued direct examination, Dr. Berchou referred to several studies that formed the basis for his opinion. Plaintiff questioned Dr. Berchou about the methodology employed in the studies. Dr. Berchou admitted that the scientific method was not used to obtain the results. However, Dr. Berchou also explained that with respect to the drug interaction at issue here, the scientific community does not "go out and subject patients to known hazards to try to develop a data base." Notably, plaintiff's expert witness, Dr. Lemmen, had already testified that Darvocet will increase Tegretol levels in some persons who are taking both drugs, and defendants' expert neurologist had previously testified that over time, Darvocet can raise the level of Tegretol in the blood. In light of Dr. Berchou's testimony regarding the numerous studies supporting his opinion, we discern no reason to conclude that his expert opinion regarding the interaction of Tegretol and Darvocet was not reliable.

Also, the evidence would have assisted the trier of fact.[6] The issue of causation was central to this case. Defendants maintained that plaintiff's Tegretol toxicity was not caused by the two hundred milligrams of Tegretol she was taking, but by the Darvocet working in conjunction with the Tegretol. Therefore, the interaction of these drugs was highly relevant.

Further, we cannot conclude that the exclusion of Dr. Berchou's testimony was harmless. The interaction of these drugs was critical to the defense's case. Contrary to plaintiff's argument, the evidence was not merely cumulative to previous testimony that Darvocet can cause elevated levels of Tegretol in the blood. None of the witnesses had testified in detail about the drug interaction. Defendants offered Dr. Berchou's testimony to explain the science of the drug interaction with greater specificity than the testimony offered by other witnesses. Notably, plaintiff's expert had opined that the amount of Darvocet plaintiff was taking was "not enough to be significant." Defendant's other expert witness had opined that the Darvocet caused plaintiff's Tegretol toxicity. In light of the conflicting evidence, the absence of Dr. Berchou's testimony explaining the drug interaction in greater detail could have affected the outcome of the trial. Accordingly, we are compelled to reverse.

II. Admission of 2-5 Note

Defendants argue that the trial court improperly admitted evidence of a note written by plaintiff, dated "2-5," regarding her medication. We agree. The decision whether to admit or exclude evidence lies within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

At trial plaintiff introduced evidence of a note written by her and dated "2-5", without any indication of the year. The note contained defendant's name and telephone number, other medications plaintiff was taking, and the notation, "Tegretol – 100 mg." Plaintiff argued that the note was indicative of her state of mind during a telephone conversation with defendant on February 5, 1996, and showed that she did not tell him that she had been taking two hundred milligrams of Tegretol. Plaintiff also offered the note to impeach defendant's testimony that during their February 1996 telephone conversation she told him she was taking two hundred milligrams of Tegretol three times per day. Plaintiff argues that the note indicates that plaintiff told defendant that she had been taking the prescribed 100 mg of Tegretol. Plaintiff's daughter verified that the note was in plaintiff's handwriting, but she could not establish that the note was written contemporaneously with a conversation between plaintiff and defendant. Defendants objected on several grounds, including that plaintiff failed to lay a proper foundation for the evidence. The court admitted the note, ruling:

> *THE COURT:* Let the record show that the Court has heard testimony with regard to it, a certain exhibit, [ ] Proposed Exhibit Number 24, whether or not it

[6] Plaintiff misconstrues and misapplies the statute. Plaintiff's counsel repeatedly characterized the list of criteria in MCL 600.2955 as "requirements." The only requirements under this statute for the admission of expert opinion is that the opinion is reliable and will assist the trier of fact. MCL 600.2955(1). In making this determination, the trial court shall *consider* the listed criteria; the statute does not require that each of the relevant considerations be satisfied.

> shall be introduced into evidence. The plaintiff has made a case for its introduction. I'm going to let the jury go to its credibility. In other words, let them figure out whether or not it's credible or not. It's, it reflects the plaintiff's state of mind whether they want to believe it's this year or whatever year it is, that's up to them.[7] But I'm going to admit it into evidence as Exhibit Number 24. [Footnote added.]

MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). We conclude that the trial court abused its discretion in admitting the note because a proper foundation was lacking.

First, although the note is dated "2-5," there is no evidence that the note was written during the telephone call with defendant on that date. Second, the notation, "Tegretol – 100 mg", standing alone, does not contradict defendant's testimony that plaintiff told him that she had been taking two hundred milligrams of Tegretol. Although plaintiff testified at trial, she did not testify about the telephone call. Accordingly, in the absence of evidence that the note reflected plaintiff's state of mind and was written during the telephone call with defendant on February 5, 1996, the note was not authenticated and should have been excluded. MRE 901(a).[8]

III. Future Damages

Defendants argue that the trial court erred in denying their motion for directed verdict on the issue of future damages because plaintiff failed to offer any evidence of her life expectancy. In light of the evidentiary error warranting reversal, we need not address this issue.

IV. Affidavit of Meritorious Defense

On cross-appeal, plaintiff argues that the trial court erred in denying their motion for summary disposition or for entry of default on the ground that defendants failed to timely file an affidavit of meritorious defense as required by MCL 600.2912e, and that defendants' affidavits did not comply with the statute because they were signed by defendant and lacked the requisite specificity under § 2912e. We conclude that even if the trial court erred in finding that defendants complied with the statute, plaintiff was not entitled to summary disposition or default.

We review summary disposition decisions de novo. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). This Court also reviews de novo issues of statutory interpretation. *Wilhelm v Mustafa*, 243 Mich App 478, 481; 624 NW2d 435 (2000), citing *VandenBerg v VandenBerg*, 231 Mich App 497, 499; 586

[7] Defendant's records show a telephone call between his office and plaintiff concerning her Tegretol dosage in February of the previous year, albeit on February 6, 1995.

[8] At oral argument, counsel for plaintiff characterized this issue as "much ado about nothing" and stated that the note "had no bearing on this case." In light of our decision to reverse on the basis of the first issue, we need not determine whether the erroneous admission of the note was harmless.

NW2d 570 (1998). We review a trial court's decision whether to enter a default for an abuse of discretion. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552; 620 NW2d 646 (2001).

Plaintiff moved for summary disposition under both MCR 2.116(C)(9), failure to state a valid defense, *Nicita v Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996), and MCR 2.116(C)(10), no genuine issue regarding any material fact, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Plaintiff argued that defendants' affidavits were untimely and that they were defective because they lacked the requisite specificity under § 2912(1) and because they were signed by the defendant doctor. Plaintiff argued that defendants' inability to articulate a valid defense supported by an independent health professional in compliance with the statute showed the lack of a valid defense. Defendants maintained that their affidavit of meritorious defense was timely filed because plaintiff's failure to timely furnish medical releases under § 2912b(6) made defendants' affidavit due at the later allowable date under MCL 600.2912e(2).[9] Defendants further argued that plaintiff suffered no prejudice from the few days by which defendants' affidavit was late, that the affidavits signed by defendant satisfied the requirements of § 2912e, and that all of defendants' affidavits had the requisite specificity.[10] After a hearing on the matter, the trial court determined that defendants had complied with the statute and denied plaintiff's motion for summary disposition or default.

The requirement in MCL 600.2912e that a defendant in a medical malpractice case file an affidavit of meritorious defense within the specified time period is mandatory. *Wilhelm v Mustafa*, 243 Mich App 478, 482; 624 NW2d 435 (2000). This Court has recognized that in a medical malpractice action, an answer without the affidavit of meritorious defense "is incomplete and does not conform with the rules[.]" *Kowalski v Fiutowski*, 247 Mich App 156, 164; 635 NW2d 502 (2001), citing *VandenBerg, supra* at 502. "[W]hen a defendant fails to file an affidavit of meritorious defense, that defendant has failed to plead." *Id.* The statute does not

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[9] MCL 600.2912e reads in pertinent part regarding the time requirements for filing an affidavit of meritorious defense:

> (1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169.

The only exception to the time limit in subsection one is given in subsection two, which applies if the plaintiff fails to allow access to medical records as required under MCL 600.2912b(6). Subsection two provides: "if the plaintiff in an action alleging medical malpractice fails to allow access to medical records as required under section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after filing an answer to the complaint." Defendants argue that subsection two applies in this case.

[10] In all, defendants submitted five affidavits of meritorious defense. Three of the affidavits were signed by defendant, and two of the affidavits were signed by Dr. William Leuchter.

provide a remedy for a defendant's noncompliance. The Legislature "intended to leave the determination of a proper remedy to the discretion of the court." *Kowalski*, *supra* at 162-163.

Assuming, without deciding, that the trial court erred in finding that defendants complied with the statute, we conclude that neither default nor summary disposition was warranted. At the time the court ruled on the motion, plaintiff had filed an affidavit signed by an independent health professional, Dr. William Leuchter, which specified the ways in which defendant had complied with the standard of care. Defendants did not fail to state a defense, and by their affidavits they demonstrated a genuine issue of material fact. Therefore, we conclude as a matter of law that plaintiff was not entitled to summary disposition. Although some lesser sanction may have been appropriate, at this stage of the proceedings it is problematic to attempt to fashion a remedy. In light of the fact that at the time the court ruled, defendants had filed a proper affidavit of meritorious defense, we do not believe that a default would have been appropriate.

Reversed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot